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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RALPH L. READ, M.D.,

Petitioner,

v.

MEDICAL X-RAY CENTER, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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12 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. MXC'S SUGGESTION THAT THE COURT NEED NOT BALANCE HARM AND BENEFITS 2

A. *Aspen* And *Lorain Journal* 2

B. MXC's Suggestion That A Jury Need Not Balance Competitive Harm And Benefits 3

C. MXC Has Offered No Justification For The Penalty Payment 4

II. MXC'S SUGGESTION THAT THE EIGHTH CIRCUIT "DISCUSSES EACH ALLEGED PREDATORY ACT" 5

III. THE CUSTOMARY PRACTICE OF MXC—A FIRM *WITH MONOPOLY POWER*—WAS THE IMPROPER BASIS OF THE EIGHTH CIRCUIT'S CONCLUSION THAT THE CONDUCT WAS NOT ANTICOMPETITIVE 5

IV. MXC'S SUGGESTION THAT THE POINTS RAISED BY DR. READ HAVE BEEN WAIVED 7

V. MXC'S VERSION OF THE FACTS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) ..... *passim*

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962) 5

Lorain Journal v. United States, 342 U.S. 143 (1951) ..... *passim*

Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975) 6

United States v. Lorain Journal, 92 F.Supp. 794 (N.D. Ohio 1950) 4

Other Authorities:

Areeda & Hovenkamp, *Antitrust Law* (1996) 1

Handler, Blake, Pitofsky and Goldschmid, Trade Regulation, 3d Ed. UCB-1 (1993) 2

INTRODUCTION

MXC's brief does not dispute MXC's possession of monopoly power. MXC also writes that, "the parties agree that MXC offered to [serve Dr. Read's customers] ***if*** he would enter into a coverage agreement with MXC." MXC's Response, p. 10. The only issue thus presented is whether MXC's demand for a payment from Dr. Read as a condition for not discriminating against his customers was anti-competitive—i.e., whether it impaired the opportunities of rivals and is neither "competition on the merits" nor more restrictive than reasonably necessary for such competition. IIIA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶650(a) at 66 (1996) ("Areeda & Hovenkamp").

MXC's brief hones to a sharp edge the parties' differences on this point. MXC first asserts that *Lorain Journal* and *Aspen* are distinguishable, and hence that the Eighth Circuit's failure to even mention those decisions is excusable. But as demonstrated below, each of those decisions proscribe conduct strikingly similar to that of MXC here. Next, MXC disputes the need for the type of Section 2 analysis sought by Dr. Read and applied by Circuits other than the Eighth. MXC writes:

> "The court of appeals *should not* have identified and then balanced the procompetitive and anticompetitive effects of MXC's conduct. . . Although this type of analysis is frequently necessary in a full-blown Sherman Act, Section 1 rule-of-reason analysis to determine whether an agreement on balance unreasonably restrains competition, whether particular conduct undertaken unilaterally is "predatory" for purposes of Section 2 is an entirely different issue." MXC's Response, p. 23 (emphasis added).

This Court's resolution of each of these issues is particularly appropriate given the scholarly recognition of the need for guidance from this Court in defining anticompetitive behavior. *See*, Handler, Blake, Pitofsky and Goldschmid, Trade Reg., 3d Ed. UCB-1 at 805 (1993).

I. MXC'S SUGGESTION THAT THE COURT NEED NOT BALANCE HARM AND BENEFITS

A. *Aspen* And *Lorain Journal*

MXC's view that *Lorain Journal* is not applicable here is tainted by its view that Dr. Read was asking that MXC "cover his practice." But that approach misses a critical element of the situation at Sioux Valley Hospital: that it was *consumers* (i.e., referring physicians) who wanted to select Dr. Read as their first choice and MXC when Dr. Read was not available. Stated another way, MXC's refusal to deal was directed primarily to referring physicians and patients who had selected Dr. Read as a first choice of radiologist.[1]

Viewed from the perspective of what consumers wanted, MXC's free-rider analysis breaks down. Consider the Home Depot example used by both parties. From the standpoint of the Main Street hardware store's customers, Home Depot's refusal to service the hardware store's customers is discrimination. Those customers (like the referring physicians in this case) do not ask that Home Depot (or MXC here) add any additional employees to service the custom-

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[1] As this Court noted in *Aspen*, it is proper to consider the effects of the alleged restraint from the standpoint of consumers, among others. See, 472 U.S. at 605 ("In addition, it is relevant to consider [the conduct's] impact on consumers. . .")

ers' needs when the hardware store is closed. They simply ask that Home Depot provide the same level of service to them as it would any other customer, and not evaluate whether the customers prefer the hardware store before deciding whether to fill their needs.

MXC asserts that *Aspen* is not applicable because, according to MXC, "unlike the defendants in *Lorain Journal* and *Aspen,* who refused to deal with their competitors, MXC did not refuse to deal with Dr. Read." MXC's Response, p. 11. But in *Aspen*, for example, this Court made clear that the defendant's offer to deal with plaintiff *if* plaintiff accepted a sharply lower share of joint venture profits did not excuse defendant's conduct. *See*, 472 U.S. at 592 ("The board decided to offer Highlands a 4-area ticket *provided* that Highlands would agree to receive a 12.5% fixed percentage of the revenue—considerably below Highlands' historical average based on usage.") (emphasis added) Here too, MXC offered a coercive deal, and the jury found that Dr. Read's rejection of that offer was justified.

B. MXC's Suggestion That A Jury Need Not Balance Competitive Harm And Benefits

MXC next suggests that in a Section 2 (monopolization) case, it is not necessary for the jury or court to balance anticompetitive effects and benefits. In other words, MXC suggests that a monopolist merely needs to "cry free-rider in a crowded courtroom" and the plaintiff loses. In support of this theory, MXC writes, "both the decisions interpreting Section 2 and commentary show that courts do not apply a Section 1-type rule-of-reason analysis in determining whether particular conduct is predatory for purposes of Section 2." MXC's Response, p. 21. But MXC acknowledges a split of authority on this point when it writes, "although some courts have folded a 'least restrictive alternative'

requirement into full-blown Section 1 rule-of-reason analysis, *others reject it." Id.*, p. 22. (emphasis added)[2]

In his opening brief, Dr. Read identified those Circuits that had rejected MXC's proposed analytical structure and had applied a full balancing of competitive benefits and detriments. See, Petition, pp. 14-16. The resolution of this issue alone is enough to warrant this Court's review of this case.

C. MXC Has Offered No Justification For The Penalty Payment

MXC next attempts to justify its demand for the penalty payment. But even after the passage of seven years since the payment was demanded, MXC still cannot articulate a reason why it needed a payment from Dr. Read. MXC repeatedly states: "testimony showed that MXC's primary concern in seeking a written agreement was to lock Read into and obtain a schedule of his presence at SVH so that it could schedule its radiologists accordingly." MXC's Response, p. 7. But the issue of when Dr. Read would be there, and when he would not, is not solvable by requiring Dr. Read to make a "penalty payment" to MXC.

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[2] This Court, for one, has written:

> The question whether Ski Co.'s conduct may properly be characterized as exclusionary conduct cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an ***unnecessarily restrictive*** way. *Aspen*, 472 U.S. at 605 (emphasis added).

And in *Lorain Journal*, the trial court had considered and rejected the newspaper's supposed business justifications as pretextual. See, *United States v. Lorain Journal*, 92 F.Supp. 794, 797 (N.D. Ohio 1950).

MXC is thus left to argue that it only sought a $1.00 payment from Dr. Read. But this was a fabrication created for trial. The proposed contract contained a "blank" in the payment section, and the language of the contract with respect to the manner of payment—e.g., that the money needed to be paid "in advance"—evidenced that MXC was demanding a significant payment. So did the fact that MXC's attorney told Dr. Read, "you're going to have to pay." Tr. 1647.

II. MXC'S SUGGESTION THAT THE EIGHTH CIRCUIT "DISCUSSES EACH ALLEGED PREDATORY ACT"

In a footnote addressing Dr. Read's contention that the Eighth Circuit did not properly apply the analysis mandated by *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), MXC states that "[the Eighth Circuit's] opinion discusses each alleged predatory act." MXC's Response, p. 10, n. 6. But nowhere does the Eighth Circuit (or MXC in its Response for that matter) mention the market division scheme the district court characterized as the most obvious of MXC's anticompetitive acts, or the fact that the district court enjoined the enforcement of the CPC/MXC contract. Without an acknowledgment of this conduct, no conclusion that MXC's conduct was legitimate is sustainable.

III. THE CUSTOMARY PRACTICE OF MXC—A FIRM *WITH MONOPOLY POWER*—WAS THE IMPROPER BASIS OF THE EIGHTH CIRCUIT'S CONCLUSION THAT THE CONDUCT WAS NOT ANTICOMPETITIVE

MXC contends that the Eighth Circuit did not base its characterization of MXC's conduct on its understanding of the "the medical community's normal coverage practices".

It contends instead that this was "one fact that, at most, [the Eighth Circuit] felt was relevant". MXC's Response, p. 10. fn. 6. But the Eighth Circuit's opinion wraps up all of the discussion of MXC's conduct into one sentence that ultimately applies an improper community standard litmus test for the conduct: "*Simply put,* Read was trying to force MXC to cover his business without following the medical community's normal coverage practices—paying MXC compensation for the service or agreeing to back up MXC doctors in exchange". App., 6a.

If as MXC argues at Response at 10, one good way of determining whether certain challenged conduct is exclusionary is to see whether "those without power engage in the same conduct", then this certainly does not justify what the Eighth Circuit has done here. MXC *has* monopoly power. The Eighth Circuit references only the practice of "paying MXC compensation", and significantly references no evidence regarding the business practices of firms in competitive markets. Dr. Read's evidence from competitive markets was that there is no practice of demanding payment from a competitor. See Petition at 17-18.

The decision here is therefore not consistent with the Tenth Circuit's opinion in *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975), cited by MXC at page 10 of its response. The *Telex* court judged the complained-of acts by whether they were, "typical of those used in a competitive market." *Id.* at 926. In analyzing conduct, it is important to distinguish, as did the Tenth Circuit, between conduct typical in a competitive market and conduct in a monopolized market. It merits this Court's consideration of Dr. Read's question of whether conduct should be excused because it is a "customary practice" in a monopolized market.

IV. MXC'S SUGGESTION THAT THE POINTS RAISED BY DR. READ HAVE BEEN WAIVED

On at least two occasions, MXC suggests that Dr. Read failed to preserve in the courts below the issues raised in this Court. But at every stage of this litigation—in summary judgment motions, in tendered jury instructions, in post-trial motions, and in the Eighth Circuit—Dr. Read raised the precise issue now before the Court. For example:

a. In his Petition for Rehearing, Dr. Read wrote, "the panel's theory . . . undermines the principles articulated in *Kansas City Star Company v. United States*, 240 F.2d 643 (8th Cir. 1957) and the case it relies upon, *Lorain Journal* . . ." and that "[the panel's decision] is at odds with *Aspen*." See, Petition For Rehearing, p. 14;

b. Dr. Read's opening brief in the court of appeals contained the following sections in the Argument portion of the brief: 1) *Lorain Journal* and *Kansas City Star* Prohibit the Type of Discrimination MXC Practiced Here (Appellee's Brief, p. 27); 2) MXC's Refusal to Cooperate With Dr. Read Violates The Principles Of *Aspen* (Appellee's Brief, p. 28); and 3) MXC's Supposed Business Justifications For Its Conduct Are Illusory (Appellee's Brief, p. 33).

These references demonstrate that Dr. Read has consistently maintained that *Lorain Journal* and *Aspen* control this case, and that the Eighth Circuit had an obligation to scrutinize MXC's proffered business justification.

V. MXC'S VERSION OF THE FACTS

MXC devotes most of the first six pages of its Response repeating the factual argument that the jury (and the district court) rejected. These factual argument are mere distractions, not affecting the questions posed to this Court

by Dr. Read. But a review of the record would reveal that MXC (like the Eighth Circuit) has lost sight of the fact that Dr. Read prevailed before the jury; and hence, that Dr. Read's version of the facts controls. A few illustrations will make the point:

a. MXC asserts that Dr. Read was "uncooperative". But prior to this litigation, Dr. Read was praised by his colleagues as "honest, hard working and dependable", "extremely bright, competent and dedicated" with unreproachable "moral, ethical and professional standards." Exh. 246; Tr. 2447;

b. MXC asserts that "Read made little or no effort, however, to compete for business at what he now refers to as "the only point[s] of market entry." MXC's Response, p. 3. But it is undisputed that Dr. Read attempted to exercise his privileges at every area hospital, and in each instance, MXC intervened to inhibit that effort;

c. MXC contends that it obtained the CPC contract because "in effect, it offered CPC a lower price than in the past." MXC's Response, p. 3. But this rationale was not accepted by either the jury or the district court (which enjoined enforcement of the contract);

d. MXC says that "Read claims that MXC entered into an exclusive contract with McKennan." MXC's Response, p. 3. But Dr. Read never made that claim. He did claim, and proved, that after a secret meeting between MXC and McKennan, Dr. Read was excluded from practicing at McKennan based on the *pretense* that there was an exclusive contract between McKennan and MXC. Tr. 313, 322, 328, 1501, 1504;

e. MXC says that "when Dr. Read did finally post a schedule of availability, it stated that he would be at SVH only three hours a day during the week." MXC's Response, p. 5. But that schedule was a guaranteed minimum, not a maximum. And Dr. Read posted it in

> an attempt to get MXC to discuss with him a workable working plan for the department of radiology; instead, MXC continued its strategy of refusing to cooperate with Dr. Read in any way. Ironically, MXC now complains that it needed a coverage contract to obtain from Dr. Read the very commitment they would not talk to him about in the summer of 1990.

The jury rejected MXC's version of the facts. Based on the proper standard of review, the Eighth Circuit should have done the same.

CONCLUSION

For the reasons stated above, and those set forth in Dr. Read's Petition For Certiorari, Dr. Read requests that this Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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